Supreme Court, U.S.
FILED
MAR 29 2001
OFFICE OF THE CLERK

MAR 29 2001 (6)

No. 00-346

IN THE

Supreme Court of the United States

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION,

Petitioner,

v.

CELESTINE GARRIS, ADMINISTRATRIX OF THE ESTATE OF CHRISTOPHER GARRIS, DECEASED,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF

ROBERT M. TATA
CARL D. GRAY
HUNTON & WILLIAMS
500 East Main Street
Suite 1000
P.O. Box 3899
Norfolk, VA 23514-3889
(757) 640-5300

JAMES T. FERRINI
Counsel of Record
KIMBLEY A. KEARNEY
MELINDA S. KOLLROSS
CLAUSEN MILLER P.C.
10 South LaSalle Street
Chicago, IL 60603
(312) 855-1010

Attorneys for Petitioner

CORPORATE DISCLOSURE STATEMENT

Petitioner's corporate disclosure statement was set forth at page *ii* of its Brief on the Merits, and there are no amendments to that statement.

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ARGUMENT

Preliminary

This case requires this Court to determine how many causes of action a harbor worker's estate/survivors have for wrongful death. Congress has provided a no fault remedy (LHWCA[1]) which plaintiff has already exercised and an action, based on negligence, against any vessel. 33 U.S.C. § 905(b). Also, state remedies provided *via* wrongful death/survival statutes and worker's compensation systems are available and often more generous. Plaintiff now asks this Court to infer/create another federal remedy based on negligence solely to circumvent application of one state's "statutory employer" defense to a state wrongful death claim.

Congress has not provided such remedy and neither should this Court.

A. Plaintiff's Uniformity For The Sake Of Uniformity Argument

Uniformity, plaintiff's "support" for extending *Moragne* and discarding this Court's decisions applying state statutes to the deaths of non-seamen,[2] is the crux of this case. The question, the answer to which is here dispositive, is whether uniformity requires the creation of a judge-made national law for the wrongful death of non-seamen in territorial waters — under circumstances where no responsibility is attributable to the vessel.

The point controlling is that the proposed cause of action is not necessary to preserve the national interest underlying the

1. 33 U.S.C. § 901, *et seq.* (1994).

2. *Tungus v. Skovgaard*, 358 U.S. 588, 590-94 (1959); *Western Fuel v. Garcia*, 257 U.S. 233, 241-42 (1921); *Old Dominion S.S. Co. v. Gilmore*, 207 U.S. 398, 404-07 (1907); *Sherlock v. Alling*, 93 U.S. 99, 104 (1876).

Admiralty Clause. Uniformity is required only when necessary to promote and protect the commercial interests of the nation as a single economic unit. The mission of this Court, as granted by Article III, Section 2 of the Constitution and defined in the Federalist Papers (see Justice Kennedy's comments, p.7 *infra*) is not to homogenize maritime law. Uniformity for uniformity's sake is not the rule.

Uniformity does not require that the law applicable to the death of Mr. Garris be the same as that which would have applied had his injuries[3] not been fatal. As this Court explained in *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996), *Moragne* created a new maritime cause of action because of very specific uniformity concerns which are not here present. *Moragne* was not concerned with variations in state remedies; *Moragne* was concerned with a distinctly maritime concept, *i.e.*, unseaworthiness, which required uniform application for harmony in international and interstate relations. The *Yamaha* court stated "[t]he uniformity concern that drove our decision in *Moragne* related . . . to the availability of unseaworthiness as a basis of liability."[4] 516 U.S. at 211.

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3. It is mere happenstance that federal law (general maritime law) would apply had Mr. Garris' injuries not been fatal. It is mere happenstance that Mr. Garris was physically on the vessel when struck by a land-based apparatus. If Mr. Garris had not yet boarded the vessel, or if he had deboarded to do preparatory work and been struck while physically on the land, Virginia law would cover a claim for personal injuries as well as the wrongful death claim.

4. *Moragne* was concerned only with a so-called "*Sieracki* seaman," a longshoreman working aboard a ship in state waters, to whom an unseaworthiness remedy had been extended for personal injuries. As a result of the 1972 amendment of the LHWCA (33 U.S.C. § 905(b)) ("liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness") and this

(Cont'd)

This Court's application of state law to wrongful deaths occurring within territorial waters is the consequence of the common law rule that personal actions do not survive death, Congress' decision to limit DOHSA to the high seas and not intrude upon state sovereignty and the reality that states are more concerned, than is the national government, with familial and other local issues. States, which may well bear the financial burdens thrust upon them by those survivors who become state charges, are particularly well positioned to identify those who should benefit from the wrongful death action and identify and quantify those benefits.

The concept of uniformity has been most commonly applied in cases where the issue has been preclusion. Those cases make plain that uniformity is not inflexible or absolute. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 323-24 (1955), (Frankfurter, J., concurring). Uniformity must be defined in the context of and within the parameters set by its origins. Article III, Section 2 of the Constitution, the Admiralty Clause, was a response to the concern that the several states, acting independently, might impede international and interstate commerce. It is when state law is disruptive of harmonious commerce that it must yield to federal law. *Romero v. International Terminal Operating Company*, 358 U.S. 354, 373-74 (1959).

Stated another way, the lure of certainty and symmetry is superficially appealing but incompatible with the highly intricate interplay of state and national governments in the regulation of maritime commerce.

(Cont'd)
Court's decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), the remedy for unseaworthiness is now available only to seamen and only, of course, against a vessel or its owner.

If, as plaintiff urges, rigid uniformity were the goal, this Court would require a single uniform body of substantive law applicable to all cases within admiralty jurisdiction. That, however, has never been the case. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 322 (1955) (the interests of shipping in its national and international aspects are substantially unconcerned with enforcement of a marine insurance clause); *Madruga v. Superior Court*, 346 U.S. 556, 562-63 (1954) (application of state law to an action for partition and forced sale of a vessel will cause no possible injury to commerce or navigation); *James Stewart & Co. v. Rivara*, 274 U.S. 614, 617 (1927) (application of New York conditional sales law does not "interfere with the use of . . . vessels as instrumentalities of interstate commerce"); *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 124 (1924) (application of a state arbitration statute does not adversely affect the characteristic features of uniformity of general maritime law); *Western Fuel v. Garcia*, 257 U.S. 233, 242 (1921) (application of state statute to an action for death of a longshoreman "will not work material prejudice to the characteristic features of general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations").

This analysis is consistent with the test for federal preclusion of state law established in *South Pacific Co. v. Jensen*, 244 U.S. 205, 216-17 (1917).

Two of the three prongs of the *Jensen* preclusion test have nothing to do with the instant case where there is no existing federal cause of action against negligent third parties. Virginia law does not conflict with any congressional enactment. Virginia law does not materially prejudice "the characteristic features of maritime law." A material characteristic is one which "originated in admiralty" or "has exclusive application " in

admiralty (*American Dredging Co. v. Miller*, 510 U.S. 443, 450 (1994)); wrongful death actions are not peculiar to and certainly did not originate in maritime law.

That leaves the third prong: preclusion is required where state law "interferes . . . with the proper harmony and uniformity of [general maritime law] *in its international and interstate relations*" (emphasis supplied). *Jensen*, 244 U.S. at 216.

Jensen's ruling, viewed within the context of its facts, is consistent with that court's identification, *via* the third prong, of the limited circumstances upon which uniformity is required. Application of the New York Worker's Compensation law would have implicated *vessel liability* and vessel liability, like seaworthiness[5], is a maritime concept, endemic to the sea and thus crucial to international/interstate commercial harmony. The decedent, a longshoreman, worked for an out of state corporation *which owned and operated the ship* decedent had been unloading. *The vessel was thus acting as its own stevedoring company*. The workers' compensation obligation of plaintiff's employer, the stevedoring company, *would have been the liability of the vessel*. The court explained that, "[i]f New York *can subject foreign ships* coming into her ports to [workers' compensation] obligations," that would be destructive of uniformity as it would interfere with freedom of navigation between states and with foreign countries. 244 U.S. at 217.

Stated another way, state law interferes "with the proper harmony and uniformity of [general maritime law] in its international and interstate relations" when state law has extraterritorial impact. *United States v. Locke*, 529 U.S. 89 (2000), and *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961),

5. The duty to furnish a seaworthy vessel is a federal one. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 627 (1978) (Marshall, J. dissenting); *Moragne v. State's Marine Lines, Inc.*, 398 U.S. 375, 395-96 (1970).

illustrate that disruption of commerce is the linchpin. In *Locke*, certain of Washington state's oil tanker regulations intruded in an area where there had been a history of significant federal presence and additionally would compromise uniformity because, *inter alia*, vessel masters would be required to learn and comply with the regulations of each port they might visit. In *Kossick*, a contract between a seaman and his employer on the subject of medical treatment was deemed a matter of national concern; a dispute could arise anywhere in the world and the contract obligation must be uniformly construed. The impact of state law in each case was extraterritorial.

American Dredging Co. v. Miller, 510 U.S. 443 (1994), a case cited throughout defendant's opening brief *but to which plaintiff offers no response*, supports this analysis. Indeed, all members of the *American Dredging* court — that is, the majority, the justices concurring and those dissenting — agreed upon the appropriate standard. Although the members of this Court reached contrary conclusions as to whether Louisiana's open forum statute, which precludes application of *forum non conveniens* to certain maritime litigation, adversely impacts uniformity, all agreed that uniformity is commerce-based and that law which has no extraterritorial effect does not interfere with harmony and uniformity of maritime law.

The majority viewed the statute as procedural and thus not an obstruction to maritime commerce: "maritime commerce in general does not require a uniform rule of *forum non conveniens.*[6]" (510 U.S. 443, 451-52) In his concurring opinion,

6. Justice Scalia indicated that in his view impairment of commerce is not the unifying theme in deciding issues of preemption but the fundamental question is "whether the state had the power to regulate the matter in the first instance." (510 U.S. 452 n.3) In that respect, this Court, by an unbroken line of cases, has acknowledged the power and interest of the states in applying their statutes to wrongful deaths occurring in territorial waters.

Justice Stevens noted that commerce is the guiding concern. 510 U.S. 443, 459-61 (Stevens, J., concurring) Commerce was also the touchstone of the dissent by Justices Kennedy and Thomas, who opined that Louisiana's denial of the defense of *forum non conveniens* in a maritime case "upsets international and interstate comity and obstructs maritime trade" — because a ship and its crew could be held in an American port to which they may have come for no reason other than refueling. 510 U.S. 443, 463-64.

The dissent, authored by Justice Kennedy, proffers an analytical framework for resolution of the issue. The Court must assess the importance of uniformity to maritime interests, analyzing that importance in light of the Admiralty Clause and consider, in the name of comity, the state interests to be promoted:

> Comity with other nations and among the States was a primary aim of the Constitution. At the time of the framing, it was essential that our prospective foreign trading partners know that the United States would uphold its treaties, respect the general maritime law, and refrain from erecting barriers to commerce. The individual States needed similar assurances from each other. See The Federalist, No. 22, pp143-145 (C. Rossiter ed 1961) (Hamilton); Madison, Vices of the Political System of the United States, 2 Writings of James Madison 362-363 (G. Hunt ed 1901). Federal admiralty and maritime jurisdiction was the solution. See 2 J. Story, Commentaries on the Constitution of the United States § 1672 (5th ed 1833); The Federalist No. 80, *supra*, at 478 (Hamilton) . . . "The confusion and difficulty, if vessels were compelled to comply with the local statutes at every port, are not difficult to

> see . . . [T]he Union was formed with the very definite design of freeing maritime commerce from intolerable restrictions incident to such control." *Washington v. W. C. Dawson & Co.*, 264 U.S. 219, 228, 68 L Ed 646, 44 S. Ct. 302 (1924). Accord, the *Lottawanna*, 21 Wall. 558, 575, 22 L Ed 654 (1875); *Jensen* 244 U. S. at 215-217, 61 L Ed 1086, 37 S. Ct. 524.

510 U.S. 443, 466-67.

This analysis is consistent with the "national interest" test Professor Robert Force has suggested to determine the substantive law applicable in admiralty cases. In his article, which has been accepted for publication, *Choice of Law in Admiralty Cases: "National Interests" and the Admiralty Clause*, 75 Tul. L. Rev. (forthcoming June, 2001) (manuscript at 59, on file with author)[7], Professor Force states:

> [I]t is submitted that the proposed "national interest" test has one additional advantage over the present approach to choice of law, that is, it provides a constitutional and principled basis for preempting state law. By deriving the meaning of the term "national interests" from the Admiralty Clause of the Constitution, and requiring that "national interests" serve as the point of departure in determining whether or not uniformity shall prevail, courts can better deal with the federalism issue. Outside of the admiralty area, federal law can oust state law only where some national interest embraced within the Constitution justifies it. The same approach should apply in admiralty cases.

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7. Copies of the article have been provided to respondent's counsel and lodged with the Clerk of this Court.

> It is difficult to assert that the Admiralty Clause requires uniformity of admiralty and maritime law in all respects because there already has been much accommodation of state law. On the other hand, it seems more principled to conclude that admiralty and maritime law must be uniform when such uniformity promotes or protects interests that underlie the Admiralty Clause. The Admiralty Clause and the interest embodied within it provide the necessary accommodation of state interests.

In a nutshell, it is not enough to assert that creation of a federal cause of action would promote oneness of law. Absent a compelling national interest requiring uniformity, the issue reduces to one of comity. National interest is marginal and there is no reason to doubt that Virginia can adequately protect the interests of its own citizens. Virginia law will not upset relations with the state or nation from which the vessel hailed. It will not impede commercial transactions or embarrass relations between this country and its trading partners.

B. The Authorities Which Invoke Uniformity To Extend *Moragne*

The Fourth Circuit below and the Ninth Circuit (*Nelson v. United States*, 639 F.2d 469 (9th Cir. 1980)) invoked but provided no analysis of uniformity. Neither gave reason why uniformity, their professed support for extending *Moragne*, is required where the death occurred in navigable but state waters which Congress declined to invade in enacting DOHSA; the decedent was a Virginia resident, working in Virginia; the alleged tortfeasors are local businesses; decedent was not a seaman and thus not one who might by "happenstance" have sustained his fatal injuries in New York, Louisiana or anywhere other than in his home state and vessel liability is not implicated.

Defendant respectfully submits that the Fourth and Ninth Circuits have misconstrued uniformity. Defendant asks this Court to consider the analysis of the highest court of New York, which is markedly parallel to Justice Kennedy's analysis in *American Dredging*, considered *supra*, and which provides a standard consistent with constitutional objectives.

Cammon v. City of New York, 2000 N.Y. LEXIS 3902, *12 (N.Y. 2000), held that uniformity does not require the application of federal law. The court instead applied a New York labor law which provided the plaintiff, an injured longshoreman, with a right of action sounding in strict liability. The circumstances were similar to those before this Court, with two notable exceptions: the sea played an active part in causing the *Cammon* plaintiff's injuries (*Id.* at *1); also, a national law is, of course, in place on the subject of injuries in territorial waters. The *Cammon* plaintiff was engaged in repairing a fender system designed to protect a pier from the impact of vessels leaving and entering the area. He had been working on a floating stage, assisted by a crane, which was positioned on a moored construction barge. In contrast to the instant case, where the crane was located on the pier, the *Cammon* crane was vulnerable to and affected by wave turbulence. The sea caused a 200 pound piece of timber which was suspended on the crane's boom, to swing wildly, striking plaintiff. *Id.* at *2-3.

The Court of Appeals held that no federal interest was directly implicated and there thus was no compelling need for uniformity. The court could give effect to the law of New York, which has a compelling interest in regulating construction practices within its borders, without interfering with "the free flow of maritime commerce." 2000 N.Y. LEXIS 3902, *12. In a word, the effect of applying New York law would not be "extraterritorial." The court stated: "[l]ocal regulations that do not affect vessel operations but rather govern liability issues

with respect to landowners and contractors within the State, have no extraterritorial effect." 2000 N.Y. LEXIS 3902, *9. *Accord*: *Inland Boatmen's Union v. Dept. of Transp.*, 836 P.2d 823, 829, 1993 AMC 479, 485 (Wash. 1992).

One further point. Even the cases cited by the *Cammon* dissent are consistent with the majority's concept of "extraterritorial effect." *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953), and *Chelentis v. Luckenbach Steamship Co.*, 247 U.S. 372 (1918), both of which involved injury claims, focused upon the impact local law would have upon international/ interstate commerce. The claim of the plaintiff in *Pope & Talbot* was directed against the vessel. 346 U.S. at 407. The claim of the plaintiff in *Chelentis* would, if governed by state law, likewise directly impact navigation and commerce: the injuries were allegedly caused by the vessel's superior officer. 247 U.S. 372, 378-79. Thus the *Chelentis* court concluded that application of national law was necessary to preclude defeat of the " 'uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states.' " 247 U.S. 372, 382.

In sum, uniformity, the professed reason for extending *Moragne*, does not withstand scrutiny. The Fourth Circuit's obligatory, but passing, reference to uniformity[8] notwithstanding, the court's decision, in fact, was result-oriented. The court's own words betray the real basis for the decision:

> We see no reason to deny Garris a basis of recovery simply because her son was a harbor worker who

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8. ". . . recognition of a general maritime law cause of action for wrongful death based upon negligence 'effectuate[s] the policies of general maritime law' because it is consistent with the policy of achieving uniformity in admiralty law." 210 F.3d 209, 221 (quoting *Moragne*, 398 U.S. 375, 400).

> died in Virginia, as opposed to another state that permits recovery against contractors. App. 45a

Sympathy is no basis for *jurisprudential* analysis. The concern of this Court is the application of constitutional and statutory principles — and not with reaching a particular result. *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 215-16 (1971).

Moreover, sympathy is an unstable compass: the direction to which it points varies as does a weathervane. Presumably if Mr. Garris lived and worked in another seaport city where death benefits were more generous and the bases of recovery more beneficial than those of the proposed, but yet undefined, new general maritime cause of action, the result reached by the Fourth Circuit would have been different.

C. Plaintiff's Assertion That *Moragne* Has Already Decided The Issue

Plaintiff, bereft of a compelling need for uniformity, retreats to quarreling with this Court's grant of review, asserting *Moragne* created a general cause of action in negligence. Plaintiff's rationale is simplistic: plaintiff in *Harrisburg* alleged negligence; *Moragne* overruled *Harrisburg*; *ergo, Moragne* created a cause of action sounding in negligence.

The Harrisburg did not focus upon negligence but upon the common law rule that no civil action of a personal nature survives death. That is an analysis applicable to all wrongful death claims and it was for that reason that *Moragne* was required to overrule rather than distinguish *The Harrisburg*. (*See* Fourth Circuit's analysis at App. 39A n.7) Also, negligence was not before the *Moragne* court. The subject was unseaworthiness and the court decided the issue before it — nothing more. Finally, unseaworthiness, like vessel negligence

(the subject of *The Harrisburg*) is a distinctly maritime concept.[9] There was a compelling need for uniformity requiring the creation of the *Moragne* cause of action because concepts, which are distinctly maritime, necessarily have extraterritorial effect. Thus, as this Court noted in *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 213 (1996), it was the state of the doctrine of unseaworthiness which impelled the *Moragne* decision.

There are no characteristic maritime concepts before this Court. Garris was not a seaman. He did not travel by vessel over the water. He lived, worked and died in Virginia. There is no claim against the vessel; there is no issue of seaworthiness; there is no need for a uniform general law to avoid tension or conflict between trading partners.

Plaintiff next would support its claim that *Moragne*'s scope was expansive with assumptions, asserting that pundits, litigants and courts[10] have assumed that *Moragne* created a general cause of action in negligence. Assumptions are meaningless. The Fourth Circuit, referencing *Gilmore & Black*, made the point below: "[t]his treatise offers no analysis to support its assertion that *Moragne* created a general maritime law cause of action for wrongful death based upon negligence." 210 F.3d 209, 216 n.5. An assumption by a court provides no greater authority. Courts decide issues as framed by the litigants before them.

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9. *Moragne*, 398 U.S. 375, 398-99; *Leathers v. Blessing*, 105 U.S. 626 (1882), and *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959), cited by plaintiff (Brf. pp. 3-4), involved negligence in the operation/navigation of the vessel. They thus involved the breach of "maritime duties."

10. *In Re Amtrak "Sunset Ltd." Train Crash*, 121 F.3d 1421 (11th Cir. 1997); *Thibodaux v. Atlantic Richfield Co*, 580 F.2d 841 (5th Cir. 1978); *Law v. Sea Drilling Corporation*, 523 F.2d 793 (5th Cir. 1975); *General Chemical Corporation v. De La Lastra*, 852 S.W.2d 916 (Tex. 1993).

Plaintiff also asserts that *Miles v. Melrose*, 882 F.2d 976, 985 (5th Cir. 1989), *aff'd sub nom. Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), and *Wahlstrom v. Kawasaki Heavy Industries, Ltd.*, 4 F.3d 1084, 1088-89 (2d Cir. 1993), decided that *Moragne* created a cause of action in negligence.

Miles did not so decide; *Miles* did not involve a general maritime law negligence claim. The subject was the death of a seaman. Plaintiff pursued claims of negligence under the Jones Act against the vessel owner and unseaworthiness under general maritime law against the vessel. Thus the case presented the very antithesis of the circumstances before this Court. The subjects in *Miles* were characteristically maritime in nature, *i.e.*, duties owed a seaman; vessel liability; unseaworthiness. The scope of *Moragne* was not litigated; the court simply made a gratuitous statement that *Moragne* created a wrongful death cause of action for negligence and unseaworthiness. (882 F.2d at 985). *Wahlstrom*, which assumed, incorrectly, — as *Yamaha* now makes clear — that *Moragne* precludes the use of state wrongful death statutes in maritime claims, simply asserted, again without the benefit of supportive analysis, that *Moragne* is not limited to unseaworthiness claims. (4 F.3d 1084, 1088-89).

Finally, it is highly significant that plaintiff does not respond to the analysis of the Fourth Circuit below, which ruled that *Moragne* did not create a general negligence cause of action. The Fourth Circuit explained that *Moragne* involved concepts peculiar to and characteristic of the sea — and which thus require uniform treatment: *i.e.*, an action against a vessel and a claim of unseaworthiness. Also, *Moragne* was impelled to create a new cause of action because of three "anomalies," all of which implicated unseaworthiness.[11] 210 F.3d 209, 215-16.

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11. *Yamaha v. Calhoun*, 516 U.S. 199, 213.

Plaintiff's only response is to assert (Plf's Brf. pp. 10, 11) that the first of the three anomalies might be construed to apply to negligence as well as unseaworthiness. *Moragne* described that anomaly as follows:

> Within territorial waters, identical conduct *violating federal law* (here the furnishing of an unseaworthy vessel) produces liability if the victim is merely injured but frequently not if he is killed. 398 U.S. 375, 395 (emphasis supplied).

If, *arguendo*, negligence were deemed to constitute conduct "violating federal law[12]", the court's statement nevertheless does not apply to negligence. *Moragne* was a gap filler; there is no gap on the subject of negligence. At the time *Moragne* was decided, all states provided wrongful death remedies for negligent conduct. Thus negligence was actionable whether the victim was killed or injured. Stated plainly, at the time *Moragne* was decided, the state of the law upon the subject of negligence did not require creation of a new cause of action — *and it does not require such today.*

Also, the *Moragne* court was, in fact, concerned with law which must be uniform because it is federal in nature or characteristic of the sea. Thus, *Miles v. Apex Marine Corp.*, specifically noted that the first anomaly *was directed to vessel liability*:

> The emergence of *unseaworthiness* as a widely used theory of liability made manifest certain anomalies in maritime law that had not previously caused great hardship. First, in territorial waters, general maritime law allowed a remedy *for unseaworthiness* resulting in injury but not death. 498 U.S. 19, 26 (emphasis supplied)

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12. Ordinary care is a creature of common law and not at all a characteristic maritime duty like seaworthiness.

In sum, *Moragne* concerned a subject that demanded uniform treatment for the sake of the country as an economic unit. The point was stated in *Yamaha v. Calhoun*: "[t]he uniformity concern that drove our decision in *Moragne* related . . . to the availability of unseaworthiness as a basis of liability." 516 U.S. 199, 211. If, *arguendo*, *Moragne* created a cause of action in negligence, *such would necessarily be limited to vessel negligence*: the subject in both *Harrisburg* and *Moragne* was vessel liability. However, *Moragne* said nothing to indicate it created such a negligence action *and, in fact, left in place the plaintiff's negligence claim under Florida law*. 516 U.S. at 214. Certainly *Moragne* had nothing to do with strictly local disputes. *Moragne* created no general maritime cause of action against land-based, local, independent contractors. *Moragne* specifically cautioned that the action it recognized was directed to removal of the tensions and discrepancies that result from using state wrongful death statutes for "exclusively maritime substantive concepts." 398 U.S. 375, 401.

There must be no mistake. The instant case is a strictly local dispute. The Fourth Circuit got it wrong. This is not a case where it is mere happenstance that Mr. Garris died in Virginia (the *Garris* court's concept, 210 F.3d at 221). Garris was not passing through; Garris lived, worked and died in Virginia. Also, defendant and E.T. Gresham and plaintiff's employer, Tidewater, are Virginia enterprises. The crane which wielded the boom was located on and operated from Virginia soil. The only happenstance is that decedent's employer hired him out to a contractor who placed him on a vessel and that he was on the vessel when struck by the boom.

D. The Proper Balancing Of Federal And Virginia Interests

Mizenko v. Electric Motor & Contracting Co. Inc., 419 S.E.2d 637 (Va. 1992), cited by plaintiff, does not support plaintiff's trivialization of Virginia's interests. *Mizenko*, which

held that the Virginia worker's compensation exclusivity provision (Va. Code Ann. § 65.2-307 (1950)) does not bar plaintiff's general maritime injury claim against a statutory employer, considered Virginia's interests as a relative concept only: "Mizenko has a substantive admiralty right . . . We view this as a compelling federal aspect in our review process." 419 S.E.2d at 642-43. The court found federal interests paramount, as state law would prejudice characteristic features of general maritime law.

Where, as here, uniformity does not compel creation of a new cause of action, plaintiff's remedy, if at all, is under Virginia law. Virginia interests are substantial upon the circumstances of the instant case which present only matters of local concern. In addition to Virginia's obvious interest in providing wrongful death remedies for the benefit of its citizens, Virginia public policy is embodied in its "statutory" or remote employer concept (Code § 65.2-302; 65.2-307(a)), which applies when employees consent to the arrangement.[13] (Code § 65.2-300(a)). The statutory goal is protection of employees of subcontractors who are not financially responsible. *Vess v. Davis Electrical Constructors, Inc.*, 613 F. Supp. 1047, 1049 (W.D. Va. 1985) (statutory employer section intended to prevent employers from escaping coverage of the Act by doing through independent contractors and subcontractors what they normally would have done through employees).[14] Also, there is a second and equally

13. By notice, an employee may exempt himself from the terms of the Act and retain his common law rights. *Dillard v. Industrial Comm. of Va.*, 347 F. Supp. 71, 73 (E.D. Va. 1972), *vacated on other grounds*, 416 U.S. 783 (1974).

14. The LHWCA's statutory employer provision (§ 904), like that of the Virginia statute, is designed to secure payment of compensation benefits due workers. *Davis v. United States Lines Co.*, 153 F. Supp. 912, 915 (E.D. Pa. 1957). The statutes differ only

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compelling objective: the exclusivity provision (Code § 65.2-307), based upon the *quid pro quo* of the worker's compensation scheme, *Whalen v. Dean Steel Erection Co.* Inc., 327 S.E.2d 102, 106 (Va. 1985), presents a measured basis, as does the LHWCA, to reasonably estimate job-related accidents and incorporate them in project costs. Worker's compensation insurance rates are based on the level of risk associated with the trade, business or occupation, (Code § 65.2-821), thereby spreading the insurance risk among industry members. *Evans v. Hook*, 387 S.E.2d 777, 780 (Va. 1990); *Counts v. Stone Container Corp.*, 387 S.E.2d 481, 484 (Va. 1990).

E. Plaintiff's Attempt To Negate Congressional Intent/ Separation Of Powers Concerns

Congress has repeatedly declined (in both DOHSA and the LHWCA) to create a federal cause of action against non-vessel third parties for the negligent death of a harbor worker in state territorial waters — thereby leaving plaintiffs such as Garris to their state law remedies. *See Miles v. Apex Marine Corp.*, 419 U.S. 19, 25 (1990) ("Congress did not extend DOHSA to territorial waters because it believed state statutes sufficient in those areas."); *Garvin v. Alumax of South Carolina, Inc.*, 787 F.2d 910, 917 (4th Cir. 1986) (LHWCA does not create a federal cause of action in favor of an employee against a third party, unless the third party is a vessel).[15] Plaintiff now asks this Court

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in the specifics of their application. Federal immunity applies only if the subcontractor has, in fact, failed to secure payment. *Garvin v. Alumax of S. Carolina, Inc.*, 787 F.2d 910, 916 (4th Cir. 1986).

15. Plaintiff's attempts to deny Congress' intent to preserve the applicability of state law to negligent wrongful death caused by non-vessel third parties in state territorial waters in DOHSA and the LHWCA are decidedly unavailing. *Moragne* addressed

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to violate separation of powers principles by discounting Congressional intent and judicially creating a remedy Congress has had multiple opportunities to consider but never seen fit to enact — solely to avoid application of unfavorable Virginia law in this case.

This the Court should not do. *Northwest Airlines v. Transport Workers*, 451 U.S. 77, 96 (1981) ("Even in admiralty . . . it is our duty to respect the will of Congress"). The court's rejection of an analogous plea by ship repair workers seeking application of federal maritime law to avoid an Alabama statute of limitations bar to asbestos injury claims in *Harville v. Johns-Manville Products Corp.*, 731 F.2d 775 (11th Cir. 1984), underscores the point:

> . . . Absent congressional action, the federal interest in these claims is insufficient to justify federal courts supplanting state law with the federal common law of admiralty. *See Executive Jet*, 409 U.S. at 272-73, 93 S. Ct. at 506-507. . . . In the situation before us, which is only fortuitously and incidentally connected to navigable waters . . . the [state] courts could plainly exercise jurisdiction over the suit, and could plainly apply familiar concepts of [state] tort law without any effect on maritime endeavors.
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> * * *

(Cont'd)
unseaworthiness, not negligence, and was promptly superseded by the 1972 Amendments to the LHWCA. Plaintiff's other cited cases all address injuries rather than death and thus have no bearing on the instant inquiry. Plaintiff's reliance upon certain LHWCA legislative history providing for application of federal law (Plf's Br., p. 42) is likewise misplaced: the cited provision is directed solely to "the negligence remedy authorized in the bill", i.e. vessel liability under Section 905(b), and thus is of no import here.

> . . . By granting the federal courts jurisdiction over maritime disputes, the Constitution does not license them to repair injustice whenever they may perceive it. **The purpose of admiralty jurisdiction is not to permit the federal courts to recognize causes of action for claims . . . whenever state law precludes such claims.** Whether or not we agree, we are bound to respect Alabama's policy, expressed in its statute and constitution, of granting repose to potential tort defendants a year after commission of the wrong. We can discern no policy requiring this Court to apply to the plaintiffs a different set of substantive rules . . . merely because the plaintiffs worked on ships rather than on land.

731 F.2d at 786-87 (emphasis supplied).

CONCLUSION

For the reasons above stated and upon the authorities cited, defendant respectfully prays for the relief requested in its opening brief.

Respectfully submitted,

ROBERT M. TATA
CARL D. GRAY
HUNTON & WILLIAMS
500 East Main Street
Suite 1000
P.O. Box 3899
Norfolk, VA 23514-3889
(757) 640-5300

JAMES T. FERRINI
Counsel of Record
KIMBLEY A. KEARNEY
MELINDA S. KOLLROSS
CLAUSEN MILLER P.C.
10 South LaSalle Street
Chicago, IL 60603
(312) 855-1010

Attorneys for Petitioner